



CENTER FOR
FOOD SAFETY

February 27, 2023

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington DC 20460

SUBMITTED VIA ONLINE SUBMISSION FORM

RE: Freedom of Information Act Request

To the U.S. Environmental Protection Agency (EPA) FOIA Officer:

The Center for Food Safety (CFS) is a 501(c)(3) national non-profit public interest and environmental advocacy organization that addresses the impact of our current industrial food production system on species and the environment. CFS has a long history of promoting sustainable farming practices and advocating and litigating issues related to genetic engineering and pesticide use. Consistent with CFS's mission and pursuant to 40 C.F.R. Part 2 and the Freedom of Information Act, 5 U.S.C. § 552, CFS respectfully requests the following information:

Any and all incident reports and communications with state regulators, weed scientists, and academics from March 2022 until the date of search informing the following statement in EPA's Press Release, EPA Approves Requested Labeling Amendments that Further Restrict the Use of Over-the-Top Dicamba in Iowa, Illinois, Indiana and South Dakota (Feb. 16, 2023), <https://www.epa.gov/pesticides/epa-approves-requested-labeling-amendments-further-restrict-use-over-top-dicamba-iowa>: "EPA has reason to believe dicamba-related incidents continued through the 2022 growing season as well."

This request is being sent to the EPA FOIA officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

WASHINGTON D.C. OFFICE
660 Pennsylvania Avenue, SE Suite 402
Washington, D.C. 20003
T: 202-547-9359 F: 202-547-9429

CALIFORNIA OFFICE
303 Sacramento Street, 2nd Floor
San Francisco, CA 94111
T: 415-826-2770 F: 415-826-0507

PACIFIC NORTHWEST OFFICE
2009 NE Alberta Street, Suite 207
Portland, OR 97211
T: 971-271-7372

REQUEST FOR FREE-WAIVER

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(1)(2)(i), EPA waives all fees in connection with the procurement of this information. As demonstrated below, the nature of this request meets the test for a fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(1)(2)(i).

In determining whether the fee waiver criteria is satisfied, CFS respectfully reminds EPA that FOIA is inclined toward disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government Information.”). Furthermore, the Ninth Circuit Court of Appeals has interpreted this waiver section broadly, holding that the section “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

The factors EPA must consider in deciding upon a fee waiver request are laid out in 40 C.F.R. § 2.107(1)(2), and those relating to a significant contribution to public understanding of the operations or activities of the government can be summarized as follows:

- (i) Whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Agency.
- (ii) Whether the disclosure of the information will likely contribute to an understanding of the subject by the general public.
- (iii) Whether disclosure the contents of the records to be disclosed have an informative value.
- (iv) Whether the contribution to public understanding is significant.

See 40 C.F.R. § 2.107(1). These factors are to be balanced against one another; no one factor is determinative. *See Friends of the Coast Fork v. U.S. Dep’t of Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

The other requirements in the regulations—related to whether the requester has a commercial interest that outweighs a public interest motivation—are not applicable to CFS and this request. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g.,* OMB Fee Guidelines, 52 Fed. Reg. 10017-18; *see also* 40 C.F.R. § 2.107(b)(1). Such interests are not present in this request. CFS does not seek information from EPA for commercial gain or interest.

I. THE PRESENT DISCLOSURE IS IN THE PUBLIC INTEREST BECAUSE IT WILL SIGNIFICANTLY CONTRIBUTE TO PUBLIC UNDERSTANDING OF THE OPERATIONS OR ACTIVITIES OF GOVERNMENT.

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

A. The subject of the disclosure concerns “the operations and activities of the government.”

The requested information pertains to damage during the 2022 growing season resulting from EPA’s 2020 dicamba registrations. It is irrefutable that EPA’s registrations are clearly identifiable operations of the government. *See* 40 C.F.R. § 2.107(l)(2)(i). The information sought by CFS reflects an interest in supporting CFS’s mission to ensure the safety of dicamba, and it is of the utmost concern to the public. This disclosure will demonstrate to the public at large the nature of EPA’s review of dicamba’s impact on federally listed species.

B. The disclosure is “likely to contribute” to an understanding of government operations or activities.

As discussed in the previous section, the present disclosure will provide the public with a better understanding of EPA’s regulatory decisions pertaining to its dicamba registrations and ongoing harm. The requested records will meaningfully inform the public about these government operations or activities in a way not currently available in the public domain. *Id.* § 2.107(l)(2)(ii).

C. CFS is highly qualified to analyze the requested information, and is aptly positioned to disseminate it to the public.

CFS is a nonprofit, public interest organization with over one million farmers and consumer supporters nationwide that informs, educates, and counsels the public—via legal action, our website, our True Food Network, books and reports, fact sheets, and blog posts, on the harm done to human health and the environment by industrial agriculture. Through nearly two decades of involvement in technical analysis, environmental litigation, and policymaking as it relates to pesticide safety, CFS has gained unique expertise and an extensive background in issues with industrial agriculture, and specifically in issues surrounding pesticides and pesticides’ effects on human health and the environment. Regarding the effects of dicamba, CFS has litigated the issue, repeatedly submitted comments to EPA, and published a legal article and other online materials. Consequently, CFS is highly qualified to fully comprehend, analyze, and organize the requested records.

In addition, CFS is aptly positioned to disseminate the requested information because CFS has a long history of educating the public about the negative effects of pesticides used on the environment. For example, CFS has educated and informed consumers and its members about pesticides by, among other things, creating publicity campaigns; producing books, reports, and a newsletter; and maintaining a website that includes numerous articles about developments in attendant pesticide use, and its consequent human health, animal welfare, and environmental

harms. Accordingly, CFS is an effective vehicle to disseminate information to the public about the dicamba registrations' ongoing damage.

Federal courts have found dissemination to 2,500 people through a newsletter and the intent to start a website sufficient to meet the "reasonably broad audience" factor. *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005). Moreover, they have found that the proven ability to digest and disseminate highly technical information, as demonstrated by past analysis and dissemination, merits giving nonprofit organizations fee waivers. *See W. Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004). CFS's activity in these respects far outstrips any minimums established by judicial interpretation.

D. The disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

The disclosure is likely to contribute significantly to public understanding of EPA's regulatory decisions pertaining to dicamba, as compared to the level of public understanding existing prior to the disclosure. 40 C.F.R. § 2.107(1)(2)(iv).

CFS employs science and policy experts who have analyzed FOIA and FIFRA and other environmental and scientific reports for their entire careers. CFS puts out reports on pesticides, genetically engineered foods, food and feed additives, and other topics that tend to be difficult for the layperson to understand without professional assistance.¹ More specifically, CFS has been engaged in ongoing efforts to educate our members and the public about the ongoing harms to pollinators, species, human health, farmers, and the environment from the toxicity of dicamba. To that end, disclosure will result in enhanced public understanding of EPA's regulatory decisions regarding dicamba. This disclosure is particularly relevant as the documents and communications regarding dicamba's environmental damage in 2022 will potentially shed light on the agency's decision surrounding the regulation of dicamba.

II. OBTAINING THE INFORMATION IS OF NO COMMERCIAL INTEREST TO CENTER FOR FOOD SAFETY.

As previously noted, CFS is a 501(c)(3) non-profit environmental advocacy organization that works to address the impacts of our industrial food production system on human health, animal welfare, and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial trade, or profit interest as those terms are commonly understood. *See e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does CFS seek information from the EPA for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the public on EPA's regulation of pesticides. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from EPA as a result of this request.

¹ *See* Publications & Resources, Center for Food Safety, <http://www.centerforfoodsafety.org/reports>.

Based on the foregoing, CFS requests that this FOIA be classified within the EPA's fee waiver category and that EPA send the requested information as required by law. As this is a matter of extreme importance to CFS, we look forward to your reply within twenty working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous, please contact me to discuss the proper scope of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction through the use of black ink. Please provide any and all non-exempt portions of any document which may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Please send all materials to mstevenson@centerforfoodsafety.org. Electronic materials are preferred but if records must be mailed, please send to 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111. Please call me at 574-309-5620 or email me at mstevenson@centerforfoodsafety.org if you have any questions about this request. Thank you for your attention to this request.

Sincerely,

/s/ Meredith Stevenson

Meredith Stevenson

Staff Attorney

Center for Food Safety

303 Sacramento Street, 2nd Floor

San Francisco, CA 94111

P: 574-309-5620

mstevenson@centerforfoodsafety.org